ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1167

SIERRA CLUB,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and ANDREW WHEELER, ADMINISTRATOR,

Respondents.

ON PETITION FOR REVIEW OF ACTION BY THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

FINAL BRIEF OF RESPONDENTS

JEFFREY BOSSERT CLARK
Assistant Attorney General
JONATHAN D. BRIGHTBILL
Deputy Assistant Attorney General

BRIAN H. LYNK
U.S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044
(202) 514-6187

OF COUNSEL:
BRIAN DOSTER
MARK KATAOKA
U.S. Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dated: June 11, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent United States Environmental Protection Agency ("EPA" or the "Agency") states the following:

A. Parties, Intervenors, and Amici

All parties to this case are listed in petitioner's brief.

B. Rulings Under Review

Petitioner seeks review of a memorandum from Peter Tsirigotis, Director of EPA's Office of Air Quality Planning and Standards, dated April 17, 2018, titled "Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program."

C. Related Cases

None at present.

/s/ *Brian H. Lynk*
Brian H. Lynk
United States Department of Justice
Environment & Natural Resources Div.
Attorney for Respondents

Dated: June 11, 2019

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CASES

[*] Cases on which EPA chiefly relies are marked with an asterix.

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GLOSSARY

EPA	United States Environmental Protection Agency
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
$PM_{2.5}$	Fine particulate matter (particles 2.5 micrometers and smaller in diameter)
SILs	Significant impact levels
$\mu g/m^3$	Micrograms per cubic meter

INTRODUCTION

Sierra Club's petition should be denied. EPA's non-binding "Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program" ("Guidance") is not final agency action.[1] On its face, the Guidance merely provides technical and legal advice to permitting authorities. It does not alter regional and state-delegated case-by-case decision-making discretion on permit applications. Petitioners' facial challenge is thus unripe. Petitioners must await the actual application of this Guidance—in the context of actual facts—should it ever be applied in a manner Petitioners think problematic.

If the Court does reach the merits of Petitioners' facial challenge, EPA's Guidance reasonably facilitates implementation of Congress' statute. The Guidance concerns "significant impact levels" or "SILs." This tool is commonly used to make an air quality demonstration required to obtain a "Prevention of Significant Deterioration" permit under the Clean Air Act, 42 U.S.C. § 7475(a)(3). The Guidance is also accompanied by two primary supporting documents

[1] *See* Memorandum from Peter Tsirigotis, EPA's Director of the Office of Air Quality Planning and Standards, to EPA's Regional Air Division Directors (April 17, 2018) (JA0001-0021). "Prevention of Significant Deterioration" is commonly abbreviated as "PSD" in EPA documents.

explaining at greater length, respectively, the legal and technical bases for the recommendations in the Guidance.[2] As is reflected in these documents, EPA appropriately used its expertise to develop methods to help demonstrate that a proposed source will not "cause, or contribute to" a violation of ambient air quality standards. *See* 42 U.S.C. § 7475(a)(3).

STATEMENT REGARDING JURISDICTION

Petitioner Sierra Club invokes jurisdiction under the Clean Air Act (the "Act"), 42 U.S.C. § 7607(b)(1). *See* Opening Brief of Petitioner at 1 ("Pet. Br.") (Doc. No. 1759508). As explained in Arguments I and II below, jurisdiction over Petitioner's facial challenges is lacking because the challenged Guidance is not a final agency action and is not ripe for review.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in a separate addendum (unless previously included in the addendum to Petitioner's brief).

[2] *See* "Legal Memorandum: Application of Significant Impact Levels in the Air Quality Demonstration for Prevention of Significant Deterioration Permitting under the Clean Air Act" ("Legal Memorandum" or "Memorandum") (JA0022-0035); "Technical Basis for the EPA's Development of the Significant Impact Thresholds for $PM_{2.5}$ and Ozone" ("Technical Basis") (JA0036-0324).

STATEMENT OF ISSUES

1. Whether the Court has jurisdiction to review a guidance statement concerning permitting that is not the final step in an Agency rule-making process, but rather provides recommendations to permitting authorities of legal and technical analysis rather than binding determinations, and thus leaves ultimate decision-making on each permit application to the exercise of those permitting authorities' discretion in a manner reviewable elsewhere?

2. If the Court has jurisdiction, whether the Act is ambiguous regarding the degree of air quality impact from a proposed source that will "cause, or contribute to" a violation, and whether EPA has reasonably interpreted that statutory phrase in light of the text, purposes and structure of the Act?

3. If the Court has jurisdiction, whether the significant impact levels recommended by the Guidance are a reasonable exercise of EPA's statutory authority to specify air quality models and the conditions under which they may be used by a permit applicant to "demonstrate" that its proposed construction will not "cause, or contribute to" a violation?

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

Congress enacted the Clean Air Act, 42 U.S.C. §§ 7401-7671q, in 1970 "to respond[] to the growing perception of air pollution as a serious national problem,"

Alabama Power v. EPA, 636 F.2d 323, 346 (D.C. Cir. 1980), by establishing a comprehensive program for controlling and improving the Nation's air quality. *NRDC v. Gorsuch*, 685 F.2d 718, 720-21 (D.C. Cir. 1982). As part of the 1977 Amendments to the Act, Congress codified the Prevention of Significant Deterioration program, 42 U.S.C. §§ 7470-79, which requires a permit prior to constructing a new "major" stationary source of air pollutants or modifying an existing one (commonly called a "preconstruction permit"). The program is designed to protect the Nation's air quality in areas in which the air is relatively clean, while assuring economic growth consistent with such protection. *See* 42 U.S.C. § 7470. In addition to requirements relating to the six "criteria pollutants" covered by the National Ambient Air Quality Standards ("NAAQS") established under 42 U.S.C. § 7409, the program requires that these preconstruction permits limit emissions of any air pollutant regulated under the Act, other than hazardous air pollutants. *Id*. § 7475(a)(4).

A "major emitting facility" is defined as any stationary source that emits or has the potential to emit 100 or 250 tons per year (depending on the type of source) of any air pollutant. 42 U.S.C. § 7479(l); *see also id*. § 7479(2)(C) (governing modifications). Such facilities may not begin construction or make modifications in any area covered by the program (an area designated attainment or unclassifiable for any NAAQS), without first obtaining a permit. *Id*. § 7475(a)(1);

see also 40 C.F.R. §§ 52.21(a)(2)(iii), 52.21(b)(1), (2), (49) (50); *Utility Air Regulatory Group v. EPA*, 572 U.S. 302, 309 (2014).

States are required to develop and submit for EPA approval state implementation plans. Each plan must contain emission limitations and other control measures to ensure that the NAAQS are achieved and maintained. 42 U.S.C. §§ 7407(a), 7410(a)(1)-(2); *see Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1137 (D.C. Cir. 1980). EPA reviews each submitted plan for compliance with the applicable provisions of the Act. *Louisiana Envtl. Action Network v. EPA*, 382 F.3d 575, 578-79 (5th Cir. 2004); 42 U.S.C. § 7410(k). The Act's Prevention of Significant Deterioration provisions are among those that the plans must address. 42 U.S.C. § 7410(a)(2)(C).

A permit applicant must demonstrate that emissions from construction or operation of the applicant's proposed facility

> will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, [or] (B) national ambient air quality standard in any air quality control region.

42 U.S.C. § 7475(a)(3). The "maximum allowable increase" of an air pollutant is a marginal level of increase above a defined baseline concentration and is known as the "increment." 75 Fed. Reg. 64,864, 64,868 (Oct. 20, 2010); 72 Fed. Reg. 54,112, 54,116 (Sept. 21, 2007); *see* 42 U.S.C. § 7473.

Section 7475(e)(3) authorizes EPA to promulgate regulations regarding the ambient air quality analysis required permit application review, including rules that "specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part." *Id*. § 7475(e)(3)(D). Over time, EPA has promulgated regulations setting forth detailed requirements for States to implement the program, *see* 40 C.F.R. § 51.166, and has issued guidance to provide further implementation assistance. EPA also has established regulations for federal implementation of the Prevention of Significant Deterioration program in states that lack an EPA-approved program in their state implementation plan. *Id*. § 52.21. However, the permitting process is implemented principally at the state level; over 40 states presently have an EPA-approved program.[3]

II. REGULATORY BACKGROUND AND PRIOR LITIGATION REGARDING SIGNIFICANT IMPACT LEVELS

A. EPA's Regulations and Existing Policy Regarding the Use of Screening Tools Such as Significant Impact Levels in the Permitting Process

As noted above, the Act directs EPA, *inter alia*, to specify air quality modeling for use in the Prevention of Significant Deterioration program. 42 U.S.C. § 7475(e)(3)(D). EPA has published a Guideline on Air Quality Models

[3] *See* https://www.epa.gov/caa-permitting/caa-permitting-your-region (information on state delegations is provided in each EPA region's webpage).

(the "Guideline"), which was updated most recently in 2017. *See* 40 C.F.R. Pt. 51, App. W; 82 Fed. Reg. 5182, 5183-84, 5192 (Jan. 17, 2017). EPA's regulations require modeling to be based on the Guideline. 40 C.F.R. §§ 51.166(*l*)(1), 52.21(*l*)(1). The Guideline identifies air quality models and modeling techniques for use in air quality assessments. *Id*. Pt. 51, App. W, §§ 1.0.a, 5.3.2, 5.4.2; Guidance at 6 (JA0007).[4]

A fundamental principle of air quality modeling under the Guideline is that an air quality analysis generally should begin with relatively simple screening techniques or models. These provide conservative estimates of air quality impact, followed, as appropriate, by more complex and refined techniques or models that provide more precise estimates of air quality impact. 40 C.F.R. Pt. 51, App. W, §§ 2.2, 4.2.1, 4.2.2. With respect to permit review, the Guideline states:

> [I]n the context of a [Prevention of Significant Deterioration] permit application, a simplified and conservative analysis may be sufficient where it shows the proposed construction clearly will not cause or contribute to ambient concentrations in excess of either the NAAQS or the [] increments.

Id. § 2.2.a.

[4] EPA also issued guidance on $PM_{2.5}$ modeling in May 2014. *Id*. at 2 n.7 (JA0003).

The Guideline also explains that the EPA may establish a "demonstration tool or method" as a means for a permit applicant to make a required air quality demonstration, either by itself or as part of a modeling demonstration. But, to be used for regulatory purposes, such a tool or method must be "reflected in a codified regulation or have a well-documented technical basis and reasoning that is contained or incorporated in the record of the regulatory decision in which it is applied." *Id*. § 2.2.e.

Consistent with these principles, EPA has historically used pollutant-specific concentration values known as "significant impact levels" as a demonstration tool. SILs identify the degree of air quality impact that either would or would not "cause, or contribute to" a violation of a NAAQS or increment, for purposes of permitting. EPA has previously issued guidance describing particular uses of SILs. *See* Guidance at 1 nn.1-4 (JA0002). None of these guidance documents were legally binding, and none were subject to a judicial challenge.

EPA has used the values in 40 C.F.R. § 51.165(b)(2) to determine what does (and does not) "cause, or contribute to" a violation in the context of section 7475(a)(3). EPA originally promulgated this regulation in 1987. 52 Fed. Reg. 24,672, 24,713 (July 1, 1987). Under this regulation, a proposed source seeking to operate in an attainment area will be considered to "cause, or contribute to" a violation of the NAAQS if its emissions impact would exceed specific values

identified in the regulation. Over time, the air quality concentration "significance levels" specified in the regulation have become known as "significant *impact* levels" or SILs, when used as part of an air quality demonstration in a permit application. *See* Guidance at 9 (JA0010).

EPA also has supported using these values to show the inverse—*i.e.*, that air quality impact below such a value *does not* cause or contribute to a violation. But prior to 2010, EPA had not incorporated this idea into a regulation. This left permitting authorities with discretion to consider the inverse implication of SILs on a case-by-case basis.

Consistent with EPA guidance, SILs historically have been used, inter alia: (1) as part of a preliminary, single-source analysis that considers only the impact of the proposed source in the permit application on air quality to determine whether a full (i.e., cumulative) impact analysis is necessary to assess whether the source would cause or contribute to a violation; and (2) as a part of a cumulative impact analysis which also considers the impact of existing sources as well as background concentrations. *See, e.g.*, 75 Fed. Reg. at 64,890; 61 Fed. Reg. 38,250, 38,293 (July 23, 1996). In the second context, EPA has supported using SILs to show that a proposed source is not "culpable" for a violation of the NAAQS or increment that might be predicted in an attainment area. This occurs through a cumulative source impact analysis on the total impacts of the proposed new or modified source

and other sources in the area. 75 Fed. Reg. at 64,890; *In re Prairie State Generating Co.*, 13 E.A.D. 1, 103-09 (EAB 2006); *see also* Guidance at 5 (JA0006) (citing other examples). EPA proposed to codify these uses of SILs into regulation in 1996, 61 Fed. Reg. at 38,291-93, but took no final action on that proposed rule.

B. Prior Rulemaking and Litigation Concerning $PM_{2.5}$ Significant Impact Levels

In 2010, EPA codified the use of the SILs described above for $PM_{2.5}$ by amending paragraph (k)(2) of its regulations at 40 C.F.R. §§ 51.166 and 52.21. EPA also incorporated $PM_{2.5}$ values into its preexisting table of significance values at 40 C.F.R. § 51.165(b)(2). *See* 75 Fed. Reg. at 64,866, 64,902. However, EPA failed to recognize an inconsistency between the inflexible terms of part of the regulation and EPA's preamble statement. The preamble stated that, in some circumstances, permitting authorities should exercise discretion before using these values to justify the conclusion that a source does not cause or contribute to a violation of the NAAQS.

Recognizing this inconsistency only after a petition for review was filed, EPA asked this Court to vacate and remand the (k)(2) paragraphs of both regulations so EPA could make a correction. *Sierra Club v. EPA*, 705 F.3d 458, 463-64 (D.C. Cir. 2013). The Court noted EPA's statement in its brief that the

regulatory text it adopted "does not allow permitting authorities the discretion to require a cumulative impact analysis, notwithstanding that the source's impact is below the SIL, where there is information that shows the proposed source would lead to a violation of the NAAQS or increments." *Id*. at 464. The Court then vacated the (k)(2) paragraphs "because they allow permitting authorities to automatically exempt sources with projected impacts below the SILs from having to make the demonstration required under 42 U.S.C. § 7475(a)(3) even in situations where the demonstration may require a more comprehensive air quality analysis." *Id*. at 465.

The Court stated that "[o]n remand, the EPA may promulgate regulations that do not include SILs or do include SILs that do not allow the construction or modification of a source to evade the requirement of the Act as do the SILs in the current rule." *Id*. at 464. The Court left intact the $PM_{2.5}$ NAAQS significance levels separately promulgated at 40 C.F.R. § 51.165(b)(2), which were not challenged. *See Sierra Club,* 705 F.3d at 465-66; Guidance at 7 (JA0008).

III. THE CHALLENGED GUIDANCE

Following the litigation over the 2010 rule, EPA initially began developing a new rule. It subsequently elected to proceed with a two-step approach, with issuance of non-binding guidance as the first step. On August 1, 2016, EPA posted on the web and sought informal public comment on a draft of the Guidance, as

well as a draft Legal Memorandum and draft Technical Basis.[5] EPA explained that, having identified in the draft Guidance a revised set of SIL values based on technical and legal analysis, the Agency "believes it should first obtain experience with the application of these values in the permitting program before establishing a generally applicable rule." Draft Guidance at 2 (JA0446); *accord* Guidance at 2 (JA0003). EPA further explained that it is providing non-binding guidance "so that we may gain valuable experience and information as permitting authorities use their discretion to apply and justify the application of the SIL values identified below on a case-by-case basis in the context of individual permitting decisions." *Id*. EPA then planned in a later second step to "use this experience and information to assess, refine and, as appropriate, codify SIL values and specific applications of those values in a future, potentially binding rulemaking." *Id*; *see also SEC v. Chenery*, 332 U.S. 194, 202 (1947).

EPA received twenty sets of public comments. Certified Index at D.40-59 (Doc. No. 1743895). EPA also conducted an external peer review of the draft Technical Basis. Guidance at 11 n. 40 (JA0012). EPA issued final versions of the Guidance, Legal Memorandum, and Technical Basis on April 17, 2018, with revisions and clarifications in response to the public and peer review comments.

[5] EPA substituted a corrected version of the draft Guidance on August 16, 2016.

The recommended SIL values, as well as the overall policy, legal, and technical approaches, were unchanged from the 2016 draft Guidance. EPA's technical approach is summarized below.[6]

A. EPA's Statistical Basis for the Recommended SILs

The Guidance identifies numerical SIL values for the $PM_{2.5}$ and ozone NAAQS, and for the $PM_{2.5}$ increments. Guidance at 15-17 (JA0016-0018).[7] These values, unlike the $PM_{2.5}$ SIL values in the 2010 rulemaking or any other SILs used in the past, are based on a new EPA statistical analysis. This provides an improved analytical foundation for the EPA's selection of SIL values that permitting authorities may elect to use on a case-by-case basis to represent "an insignificant impact on air pollutant concentrations" in air quality analyses for permitting. *Id*. at 10 (JA0011).

To develop the recommended, non-binding SILs for ozone and $PM_{2.5}$ in the Guidance, EPA assessed the variability in ambient ozone and $PM_{2.5}$ pollutant concentrations independently. This was determined through analysis of 17 years of monitoring data from the national air quality monitoring network, using the "design value" at each monitor. Guidance at 12 (JA0013). Because each NAAQS

[6] EPA's legal analysis is described in Argument III *infra*.

[7] No increments have been established for the ozone NAAQS. *Id*. at 16 (JA0017).

has a unique statistical form, it is necessary to derive a design value at a monitor, which is a statistic or summary metric for a specific NAAQS that describes the air quality at a location relative to the level of the NAAQS in the appropriate statistical form, based on (for the ozone and $PM_{2.5}$ NAAQS) the most recent three years of monitored data. Technical Basis at 5-6 (JA0040-0041). For example, for the ozone NAAQS, the design value at a monitor location at a given time is the 3-year average of the annual 4th-highest daily maximum 8-hr average ozone concentration. An air quality monitor meets the ozone NAAQS if the design value is less than or equal to the ozone standard of 70 parts per billion. *Id*. at 8 (JA0043); *see also id*. (describing design values for the $PM_{2.5}$ NAAQS).

EPA used a well-established statistical approach known as "bootstrapping." This enables an analyst to quantify the uncertainty of a statistical sample, making it easier to interpret the data. Technical Basis at 6-7 (JA0041-0042). This technique was applied to the ambient data from the 1,708 ozone and the 1,773 $PM_{2.5}$ monitoring stations over a 17-year period (2000-2016). EPA determined the air quality variability as a function of the design values reported by this nationwide air quality monitoring network. *Id*. at 9-10 (JA0044-0045).

EPA's statistical analysis determined, for each air quality monitor in the national network (based on ambient data from that monitor), a range of "confidence intervals." These are "statistical measures of the variability associated

with the monitor-based [design values], to inform the degree of air quality change that can be considered an 'insignificant impact' for [Prevention of Significant Deterioration] applications." *Id*. at 7 (JA0042). The fundamental concept behind this approach is that "an anthropogenic perturbation of air quality that is within a specified range may be considered indistinguishable from the inherent variability in the measured atmospheric concentrations and is, from a statistical standpoint, *not significant* at the given confidence level." *Id*. (emphasis in original).

EPA applied the bootstrapping analysis to the ambient data such that the specific forms and data handling requirements of each NAAQS were accounted for in the variability estimates. Technical Basis at 21 (JA0056). The analysis determined 20,000 potential design values for each of the 1,708 ozone and 1,773 $PM_{2.5}$ monitors for each consecutive 3-year design period in the 17 years analyzed. These 20,000 samples allow for an estimate of the range of air quality variability, with the 25%, 50%, 68%, 75% and 95% confidence intervals calculated for each monitoring site and each 3-year design period representing various levels of variability based on the selected confidence interval. *Id*. at 22-23 (JA0057-0058). Each confidence interval is associated with a range of air quality variability that becomes narrower as the stated percentage decreases—e.g., a 75% confidence interval represents a narrower range of variability than 95%. The variability estimates at each confidence interval were aggregated for each design period and

compared across the range of baseline design values in order to characterize the behavior of the variability as underlying air quality changed. *Id*. at 25-28 (JA0060-0063). Additionally, the variability determined from the bootstrapping analysis was compared to the variability in air quality as determined by comparing design values from pairs of monitors that were geographically close to one another. *Id*. at 29-34 (JA0064-0069); *see also id*. at 35-37 (JA0070-0072).

After deriving these variability estimates across a range of confidence intervals, EPA then sought to identify one of these estimates that could be used to determine a degree of air quality impact that would be *not* statistically significant (and thus could represent an impact that would not "cause, or contribute to" a violation of the NAAQS or increment). To do this, EPA considered four factors. *See* Technical Basis at 38 (JA0073); Guidance at 13-14 (JA0014-0015).

First, EPA considered which confidence interval would best represent the inherent variability in measured ozone and $PM_{2.5}$ atmospheric concentrations. Technical Basis at 38 (JA0073). EPA observed that the 68% confidence interval corresponds to one standard deviation from the mean value (here, the "design value" as described above), which in statistics is traditionally regarded as the minimum deviation above which a deviation from the mean would be considered statistically significant. *Id*. at 38-39 (JA0073-0074). Because EPA's purpose was to identify a value below which variability in air quality concentrations could be

considered *not* statistically significant, EPA reasoned that it should use a confidence interval smaller than 68%. *Id*. at 39 (JA0074). But EPA then had to determine how much smaller—whether to use the values based on the 50% or 25% confidence interval. EPA found that a 50 percent confidence interval "represents a protective approach for a SIL value because it is sufficiently within the 68 percent [interval], while still being sufficiently higher than zero such that it can be a useful compliance demonstration tool for the [] permitting process." Guidance at 13 (JA0014).

Second, EPA considered whether to calculate the 50% confidence interval as an absolute amount of change or as a relative percentage of change from the design value at each monitoring location. Technical Basis at 39 (JA0074). EPA chose relative variability because that metric was "fairly consistent across the range of design values" at monitoring sites nationwide, irrespective of baseline air quality level and other variables. *Id*.

Third, EPA considered whether to recommend national SIL values based on aggregate air quality variability or local or regional SILs based on statistical analysis at particular sites or in particular regions. Technical Basis at 39-40 (JA0074-0075). EPA's analysis showed that there were no large scale (i.e., region-to-region) trends, with few instances of regional patterns in air quality variability, and no strong instances of east/west or north/south trends. *Id*. at 40 (JA0075). For

this and other reasons, EPA recommended national values. *Id.*; *accord* Guidance at 13-14 (JA0014-0015).

Finally, EPA considered whether to use all of the air quality data available from 2000 through 2016, or only a subset. Technical Basis at 40 (JA0075). EPA observed that using a recent subset of the data would generally result in lower SIL values (due to less air quality variability) and also would enable the SILs to "reflect the most representative state of the atmosphere." Accordingly, EPA used the average of the three most recent design value periods to calculate the SILs. *Id.*; *accord* Guidance at 14 (JA0015).

B. The SIL Values Calculated by EPA

Applying each of the above methodological determinations, EPA's Guidance recommends the following SIL values for the ozone and $PM_{2.5}$ NAAQS:

Pollutant (averaging period)	NAAQS level	Recommended SIL
Ozone (8-hour)	70 parts per billion	1.0 part per billion
$PM_{2.5}$ (24-hour)	35 $\mu g/m^3$	1.2 $\mu g/m^3$
$PM_{2.5}$ (annual)	12 $\mu g/m^3$ (primary) or 15 $\mu g/m^3$ (secondary)	0.2 $\mu g/m^3$

See Guidance at 15 (JA0016). For the 24-hour $PM_{2.5}$ NAAQS, EPA preliminarily derived a SIL value of 1.5 $\mu g/m^3$ using the statistical approach summarized above.

But as EPA explained, the Agency remains bound by the 2010 regulatory provisions at 40 C.F.R. § 51.165(b)(2) that were not vacated and are still in effect, under which a $PM_{2.5}$ air quality impact above 1.2 $\mu g/m^3$ is deemed to cause or contribute to a violation of the 24-hour $PM_{2.5}$ NAAQS at any location that does not meet this standard. Guidance at 15 (JA0016).

For $PM_{2.5}$ increments, EPA developed SILs using the same air quality variability approach, but differentiated between areas of the country designated "Class I" under the Act—i.e., areas in which "the need to prevent deterioration of air quality is the greatest," and which have smaller increments as a result—from other areas. Guidance at 16-17 and n.43 (JA0017-0018). As shown below, the Guidance conservatively recommends lower SIL values for $PM_{2.5}$ increments in Class I areas than the recommended SIL values for the corresponding $PM_{2.5}$ NAAQS. In Class II and III areas, the recommended SILs for the $PM_{2.5}$ NAAQS and increments are identical:

Criteria Pollutant (averaging period)	Increments[8]			Recommended SIL		
	Class I	Class II	Class III[9]	Class I	Class II	Class III
$PM_{2.5}$ (24-hour)	2 µg/m^3	9 µg/m^3	18 µg/m^3	0.27 µg/m^3	1.2 µg/m^3	1.2 µg/m^3
$PM_{2.5}$ (annual)	1 µg/m^3	4 µg/m^3	8 µg/m^3	0.05 µg/m^3	0.2 µg/m^3	0.2 µg/m^3

C. EPA's Explanation Regarding the Use of The Guidance and Permitting Authorities' Discretion

EPA discussed in the Guidance its recommended uses and the decision-making discretion that permitting authorities retain. EPA "recommends that permitting authorities consider using these SIL values for ozone and $PM_{2.5}$ on a case-by-case basis at the same points in the [] air quality analysis as SIL values historically have been used in the [] program [with one exception not relevant here]." Guidance at 17-18 (JA0018-0019). However, "permitting authorities

[8] Table 2 in Petitioner's Proof Opening Brief inadvertently errs in presenting the increment values. *Id*. at 17; *see* 40 C.F.R. § 51.166(c)(1); *id*. § 52.21(c); 75 Fed. Reg. at 64,865.

[9] There are currently no areas designated as Class III. Guidance at 17 (JA0018).

retain the discretion not to use SILs as described here, either in specific cases or programmatically." *Id*. at 19 (JA0020). Permitting authorities "are also not precluded from developing and using lower SIL values than recommended in this guidance," or higher SIL values than those recommended for the ozone NAAQS or $PM_{2.5}$ increments (as neither is addressed by the 2010 rule provision concerning $PM_{2.5}$ NAAQS "significance values" in 51.165(b)(2) that this Court left in place).[10]

In contrast to the regulatory text in the 2010 rule that was vacated by this Court, where a SIL is used and the modeled air quality impacts from a proposed source are below the SIL, the Guidance nonetheless states that:

> [U]pon considering the permit record in an individual case, if a permitting authority has a basis for concern that a demonstration that a proposed source's impact is below the relevant SIL value at all locations is not sufficient to demonstrate that the proposed source will not cause or contribute to a violation, then the permitting authority should require additional information from the permit applicant to make the required air quality impact demonstration.

Guidance at 18 (JA0019). The Guidance further makes clear that "[t]he case-by-case use of SIL values should be justified in the record for each permit," and that the record for any permitting decision using a SIL recommended in the Guidance

[10] Under the 2010 rule, any air quality impact greater than the significance values codified at 40 C.F.R. § 51.165(b)(2) in 2010 for $PM_{2.5}$ is deemed to cause or contribute to a violation of the $PM_{2.5}$ NAAQS at any location that does not meet the standard. *See* Guidance at 7 (JA0008).

should fully incorporate the information contained in the Guidance, including the technical and legal documents. *Id*. at 19 (JA0020); *accord* 40 C.F.R. Pt. 51, App. W, § 2.2.e.

STANDARD OF REVIEW

Petitioners bear the burden of demonstrating that the Court has subject-matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007). The "case-or-controversy" requirement of Article III of the Constitution must be satisfied at all stages of the litigation. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

If there is jurisdiction, the Clean Air Act sets forth the standard of review, which is the same as that in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). *Catawba County, N.C. v. EPA*, 571 F.3d 20, 41 (D.C. Cir. 2009) (citations omitted). The Court considers whether EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). The Court "must affirm the Rule if the record shows EPA considered all relevant factors and articulated a 'rational connection between the facts found and the choice made."' *Catawba*, 571 F.3d at 41 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). EPA is also entitled to an "extreme degree of deference [] when it is evaluating scientific data within its

technical expertise." *City of Waukesha v. EPA*, 320 F.3d 228, 247 (D.C. Cir. 2003) (internal quotation marks omitted). "Such deference is especially appropriate in [the Court's] review of EPA's administration of the complicated provisions of the Clean Air Act." *Catawba*, 571 F.3d at 41 (citation omitted).

In reviewing EPA's interpretation of the Act, the Court must inquire whether Congress "has directly spoken to the precise question at issue" and, if so, must give effect to Congress' "unambiguously expressed intent." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). If the statute is "silent or ambiguous with respect to the specific issue," the Court considers "whether the agency's answer is based on a permissible construction," *id*. at 843, and "may not substitute its own construction . . . for [EPA's] reasonable interpretation." *Id*. at 844.

SUMMARY OF ARGUMENT

The Guidance is not a final agency action subject to this Court's review, as it does not establish any new binding legal norm. SILs have been used for decades, consistent with EPA regulations, in making the air quality demonstration that is required of a permit applicant. The Guidance does not alter how SILs have historically been used in that context. Rather, it identifies new SIL values for $PM_{2.5}$ and ozone based on an improved statistical and analytic approach and recommends that permit applicants and permitting authorities apply those values in making the required demonstration.

Additionally, the Guidance is supported by a more robust legal justification of how the use of SILs comports with applicable statutory provisions and case law. The Guidance only makes *recommendations* and supplies a supporting rationale that states and EPA field offices may elect to use in their permitting decisions. The Guidance is *not* binding in any particular permit application review, has no legal effect, and does not substitute for or reduce the discretion that individual permitting authorities have in reviewing each permit application and in making permitting decisions subject to review. The decision each permitting authority makes must stand or fall on the record developed in that permitting proceeding and based on the justification that the permitting authority provides. The Guidance does not purport to and in fact does not, merely by its issuance, "authorize" any particular decision by a permitting authority. As such, the Guidance is not a reviewable final action, and the issues Petitioner seeks to raise will not be ripe unless and until they arise in the context of a specific permitting decision. *See infra* Arguments I, II.

On the merits (Argument III), EPA's interpretation of the "cause, and contribute to" language in 42 U.S.C.§ 7475(a)(3) is consistent with the Court's case law finding that the term "contribute" does not have a plain and obvious meaning and is ambiguous in the context of air pollutant emissions. EPA reasonably interprets the language to allow permitting authorities to conclude that

modeled air quality impacts below the recommended SILs, based on consideration of the facts in each permitting action and the statistical analysis developed by EPA, do not cause or contribute to a violation in the modeled area. EPA thoroughly explained the statistical methodology underlying the recommended SIL values. Petitioner fails to overcome the extreme deference owed to EPA regarding the development of that methodology.

ARGUMENT

I. THE GUIDANCE IS NOT FINAL AGENCY ACTION.

The Clean Air Act's judicial review provision states, in pertinent part, that "nationally applicable regulations promulgated, or [any other] final action taken, by the Administrator under this chapter" is subject to review. 42 U.S.C. § 7607(b)(1). EPA did not "promulgate" the Guidance as a "regulation[]", but rather wrote informal Guidance consistent with its stated aim of giving non-binding recommendations.[11] Thus, the Guidance is reviewable only if it is "other . . . *final* action." *Id.* § 7607(b)(1) (emphasis added); *see Portland Cement Ass'n v. EPA*, 665 F.3d 177, 193 (D.C. Cir. 2011). This finality inquiry is governed by the familiar two-part test in *Bennett v. Spear*, 520 U.S. 154 (1997). Under *Bennett*, to be final, an action "must be one by which rights or obligations have been

[11] Petitioner has not mounted any procedural challenge to the Guidance.

determined, or from which legal consequences will flow," and "must mark the consummation of the agency's decisionmaking process . . . it must not be of a merely tentative or interlocutory nature." *Id.* at 177-78 (internal quotations and citations omitted). The Guidance meets neither criterion.

A. The Guidance Does Not Have Binding Legal Consequences or Conclusively Determine Rights or Obligations.

When deciding whether guidance statements "determine rights or obligations," this Court has considered factors including: (1) "most important[ly,] . . . the actual legal effect (or lack thereof) of the agency action in question on regulated entities"; (2) "the agency's characterization of the guidance"; and (3) "whether the agency has applied the guidance as if it were binding on regulated parties." *National Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014). Here, all of these factors weigh against finality.

1. The Guidance has no legal effect on regulated entities.

As to the Guidance's "actual legal effect . . . on regulated entities": it has none. The Guidance contains recommended SIL values that "permit applicants and permitting authorities may elect to use," and supporting legal and technical analyses that "permitting authorities may choose to adopt [as well as the Guidance itself]" in supporting the use of the SILs in particular [] permitting actions. Guidance at 1 (JA0002). In advance of a planned future EPA SILs rulemaking,

decisions on whether to allow the use of SILs in permitting actions are made under existing statutory and regulatory Prevention of Significant Deterioration permitting requirements by individual permitting authorities. They "retain discretion whether to apply SILs as a general matter, or in particular permitting actions." *Id*. at 10 (JA0011). EPA explicitly stated in the Guidance that "[s]ince this guidance is neither a final determination nor a binding regulation, permitting authorities retain the discretion not to use the SILs as described here, either in specific cases or programmatically." *Id*. at 19 (JA0020). Permitting authorities also may develop and justify the use of different SIL values than those the Guidance recommends, supported by a record showing that "the value represents a level below which a proposed source does not cause or contribute to a violation of the NAAQS or [] increment." *Id*. at 19-20 (JA0020-0021).

Contrary to Petitioner's claims, *e.g.*, Pet. Br. at 13, the Guidance does not in any legal or regulatory sense "authorize" a determination that any specific proposed source will not cause or contribute to a violation. Legal requirements in the Clean Air Act and EPA's regulations for the issuance of permits, including the "demonstration" requirement of 42 U.S.C. § 7475(a)(3), remain wholly unchanged by the Guidance. And, apart from its general complaints about "authorization," Petitioner does not show that the Guidance is written or has been applied in a binding manner.

Petitioner contends that the Guidance has legal effect based on its understanding that "EPA's rationale for SILs . . . departs from any prior [legal] approach EPA has taken to the PSD permitting process." Pet. Br. at 18. Petitioner exaggerates. While it is true that some prior EPA actions (such as the 2010 rule) relied on *de minimis* authority for allowing the use of SILs, EPA has recognized in many such actions the alternative legal basis that "cause, or contribute to" could be construed not to apply to insignificant air quality impacts. *See* Memorandum at 13 n.9 (JA0034). Moreover, the "finality" of a legal interpretation does not turn solely on whether it is "new"; rather, the question under *Bennett* is whether permitting authorities are *required* to adopt or implement the interpretation.[12] As EPA's above-quoted explanations of the Guidance's effect makes clear, they are not. *See National Mining Ass'n*, 758 F.3d at 252 (holding that a guidance statement was not final action because, "[a]s a matter of law, state permitting authorities . . . may ignore EPA's . . . Guidance without facing any legal consequences"; *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 944

[12] Although Petitioner has not expressly challenged the Guidance on the ground of failure to follow rule-making procedures (and has therefore waived any such challenge), its argument echoes the logic of the now-overruled *Paralyzed Veterans* doctrine. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206-07 (2015) (abrogating *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579 (1997), and holding that interpretive rules are not subject to Administrative Procedure Act notice-and-comment requirements even if the interpretation is new).

(D.C. Cir. 2012) (FDA warning letter not final because it did not compel action by the recipient or agency).

The Guidance also does not establish any new norms with respect to the process by which permit applicants may make the demonstration that a proposed source "will not cause or contribute." Instead, it recommends that permitting authorities consider using the SILS EPA developed "*at the same points* in the [Prevention of Significant Deterioration] air quality analysis as SIL values historically have been used in the [] program [with one irrelevant exception]." Guidance at 17 (JA0018) (emphasis added). Thus, for example, the Guidance did not "establish" a "new" demonstration procedure by recommending that "permitting authorities may use SILs in a preliminary analysis 'that considers only the impact of the proposed source on air quality,'" Pet. Br. at 13. SILs have been used in that manner in the permitting process since at least 1988. *See* Memorandum from Gerald A. Emison to Thomas J. Maslany, "Air Quality Analysis for Prevention of Significant Deterioration" (July 5, 1988) (JA0351-0355); *see also* Memorandum at 1 n.1, 9-10 (JA0022, JA0030-0031); 40 C.F.R. Pt. 51, App. W, § 9.2.3; *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443, 448 (1st Cir. 2000) (upholding EPA's reliance on SILs). In short, the Guidance does not create a new and binding legal regime.

2. EPA did not characterize the Guidance in binding terms.

This Court has also given weight to EPA's own characterization of its guidance statements when considering whether they constitute final action. "[A]n agency pronouncement will be considered binding as a practical matter if it . . . appears on its face to be binding." *Catawba County*, 571 F.3d at 33. By this measure, as well, the Guidance plainly is not a final agency action. The Guidance expressly states that "[s]ince this guidance is neither a final determination nor a binding regulation, permitting authorities retain the discretion not to use SILs as described here, either in specific cases or programmatically." *Id*. at 19 (JA0020); *see also id*. at Cover Memo, 3. (JA0001, JA0004).

More specifically, permitting authorities "retain the discretion to use other values that may be justified separately from this guidance as levels of insignificant impact," including values lower than those EPA recommends; or they may elect "programmatically" not to use SILs at all. *Id*. at 19-20 (JA0020-0021); *see also id*. at 4 (JA0005) ("The experience of permitting authorities using these SILs on a case-by-case basis, or in choosing to limit or forego their use in specific situations, will be valuable information for the EPA"). Thus, contrary to the types of guidance statements that courts have held to be judicially reviewable, the Guidance is expressed in terms that make clear repeatedly and throughout the document that EPA did not intend to foreclose the discretion of permitting authorities. *See*

National Mining Ass'n, 758 F.3d at 252-53 (finding that guidance was not final action where "the caveats" regarding its effect "r[a]n throughout the document" and it was "devoid of . . . commands," and contrasting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000)).

Both *Catawba County* and *National Mining Ass'n* are instructive cases. *Catawba County* involved challenges to an EPA memo that "provide[d] guidance to State and local air pollution agencies . . . on the process for designating areas for purposes of implementing the [$PM_{2.5}$ NAAQS]." 571 F.3d at 33 (quoting memo). It then "explicitly state[d] that it [wa]s 'not binding' on the states or EPA and note[d] that it provide[d] only EPA's 'current views' on the designation process suggesting that those views were open to revision." *Id*. at 33-34. The court concluded that such language did not "impose binding duties on states or the agency." *Id*. at 34. Here, likewise, the Guidance plainly states that permitting authorities "retain the discretion to apply and justify different approaches and to require additional information from the permit applicant to make the required . . . demonstration, consistent with the relevant []permitting requirements." Guidance at 4 (JA0005).

National Mining Ass'n involved challenges to an EPA guidance document providing recommendations to States concerning National Pollutant Discharge Elimination System permits under the Clean Water Act. 758 F.3d at 247-48, 250.

Despite that guidance document's express assurances that it was not binding, the petitioner "argue[d] that permit applicants (and state permitting authorities) really have no choice when faced with EPA 'recommendations' except to fold," *id*. at 253, a claim Petitioner echoes here.[13] The Court reasoned, however, that "while regulated parties may feel pressure to voluntarily conform their behavior because the writing is on the wall about what will be needed to obtain a permit, there has been no order compelling the regulated entity to do anything." 758 F.3d at 253; *accord Panhandle Producers & Royalty Owners Ass'n v. Econ. Regulatory Admin.*, 822 F.2d 1105, 1110 (D.C. Cir. 1987) ("An agency pronouncement is not deemed a binding regulation merely because it may have some substantive impact, as long as it leaves [the relevant decisionmaker] free to exercise his [or her] informed discretion."). Similarly, here, the fact that some permitting authorities have chosen to use the Guidance does not establish that it is legally binding.

Finally, the Court re-emphasized in *National Mining Ass'n* the longstanding rule that "[w]hen [an] agency applies a [general statement of] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." 758 F.3d at 253. The Guidance is faithful to this rule,

[13] One of Petitioner's standing declarants asserts that "permitting authorities and applicants have already been relying on" the Guidance. Declaration of Mary Anne Hitt at 12 (DEC0019).

instructing permitting authorities that "the case-by-case use of SILs values should be justified in the record for each permit." Guidance at 19 (JA0020). It further instructs that "[t]o ensure an adequate record, any []permitting decision that is based on this guidance (including the technical and legal documents) should incorporate the information contained in them" as well as any additional relevant information. *Id*. In short, under *Catawba County and National Mining Ass'n*, the Guidance is not final action.

3. EPA has not applied the SILs as if they were binding.

On the remaining factor this Court has identified—whether the Agency has applied its guidance as if it were binding—Petitioner's assertions also fall short of the mark. *See National Mining Ass'n*, 758 F.3d at 253. Even assuming that "EPA plans to use SILs in its administration of PSD permitting" in States and areas without an approved program in their state implementation plan, Pet. Br. at 13, Petitioner points to no evidence (beyond its bare assertion) that EPA has actually applied the Guidance inflexibly. On its face, the Guidance preserves the Agency's discretion regarding what degree of modeling or analysis may be necessary in some case-by-case circumstances. *See* Guidance at 3 (JA0004) ("EPA believes that the application of these SILs in the manner described below would be sufficient in *most* situations for a permitting authority to conclude that a proposed

source will not cause or contribute to a [ozone or $PM_{2.5}$] violation") (emphasis added).

For example, while Petitioner cites the approval of the Palmdale Energy Project permit as an instance in which EPA followed the rationale in the Memorandum, Hitt Decl. at 13 (DEC0031), in that decision EPA decided not to rely solely on single-source analysis using SILs. Instead, EPA performed cumulative modeling analysis of $PM_{2.5}$ air quality impacts. Attachment A at 57-58.[14] EPA also noted that its air quality assessments for other criteria pollutants were "justified and appropriate even without any consideration of or comparison to" the SILs for those pollutants. DEC0143.

B. The Guidance Did Not Mark the Consummation of EPA's Rulemaking Process for SILs.

The Guidance also is not final action because issuing the Guidance neither ends the process EPA has undertaken in response to the Court's partial vacatur and remand of the 2010 rule, nor does its application unalterably lead to determinations that proposed facilities will not "cause or contribute" to a violation.

As to the development of the Guidance itself, EPA explains it "intends at this point to take a two-step approach." *Id*. at 2 (JA0003). First, "EPA is

[14] EPA Region 9, "Fact Sheet, Palmdale Energy Project, PSD Permit: SE 17-01" (Aug. 2017).

providing non-binding guidance so that we may gain valuable experience and information as permitting authorities use their discretion to apply and justify the application of the SILs values identified below on a case-by-case basis . . . .” *Id*. Second, “EPA will use this experience and information to assess, refine and, as appropriate, codify SIL values and specific applications of those values in a future, potentially binding rulemaking.” *Id*.; *see also* RIN 2060-AR28 (JA0874) (EPA’s Fall 2018 regulatory agenda, noting that “[b]ased on the information gathered from the implementation of [the Guidance] by the permitting authorities, EPA will complete a rulemaking action, as appropriate”).

EPA indicated that it will consider whether the case-by-case permitting experience “has confirmed that the recommended SIL values are suitable in all circumstances to show that an increase in air quality concentration below the value does not cause or contribute to a violation.” Guidance at 3 (JA0004). However, pending that, EPA’s Guidance cannot, by itself, be the basis for a permit decision. EPA emphasized permitting authorities’ discretion “to develop alternative SIL values,” including SILs based on different confidence intervals or taking into account regional or local factors. *Id*. Thus, the content of a future proposed rulemaking for ozone and $PM_{2.5}$ SILs, let alone a final regulation, is undetermined. *See SEC v. Chenery*, 332 U.S. at 202 (“Not every principle essential to the

effective administration of a statute can or should be cast immediately into the mold of a general rule.").

For the above reasons, *Bennett*'s first prong also is not satisfied. *See Portland Cement Ass'n*, 665 F.3d at 193 (decision not to address greenhouse gas emissions in new source performance standards was not final action because EPA indicated it was "working towards a proposal" for such standards); *Utility Air Regulatory Group v. EPA*, 320 F.3d 272, 278-79 (D.C. Cir. 2003) (guidance document interpreting regulatory provisions not final where its language was not binding and EPA was undertaking a rulemaking to amend those provisions).

II. THE GUIDANCE ALSO IS NOT RIPE FOR REVIEW.

Lack of ripeness is an additional reason to dismiss this petition. "Courts are obliged to avoid 'entangling themselves in abstract disagreements over administrative policies [] and . . . to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way . . . ." *Utility Air Regulatory Group*, 320 F.3d at 278 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-19 (1967) (alterations in original)). To determine ripeness, courts consider the fitness of the issues for judicial decision—encompassing factors that include whether consideration of the issues would benefit from a more concrete setting, and whether the agency's action is

sufficiently final—as well as the hardship to the parties of postponing review. *Utility Air Reg. Group*, 320 F.3d at 279 (internal quotations and citations omitted).

Here, Petitioner cannot satisfy the "fitness" test for the same reasons discussed in Argument I. Merely issuing the Guidance did not have any immediate, binding legal effect, and decisions on individual permits may make the particular issues Petitioner now attempts to raise more concrete. *See, e.g.*, *Utility Air Reg. Group*, 320 F.3d at 278-29. For example, Petitioners' concerns about the use of SILs in areas "where the increment or NAAQS is already mostly consumed or where many sources are being built" are better tested in the context of actual data from a specific air quality demonstration in an area presenting those circumstances. Pet. Br. at 47.

There is also no "hardship" from postponing review. Petitioner and other interested parties would have the opportunity to raise their objections to the Guidance's interpretation of 42 U.S.C. § 7475(a)(3) in the context of any individual permit application in which the permitting authority chooses to follow that legal rationale. Moreover, for state-issued permits—i.e., the bulk of Prevention of Significant Deterioration permits—the proper forum for raising such objections is not federal court, but rather the state administrative and (if necessary) judicial process. *See, e.g.*, *Nucor Steel-Arkansas v. Big River Steel, LLC*, 824 F.3d 444, 451 (8th Cir. 2016) (holding that state judicial review was the proper means to

challenge the state's issuance of a PSD permit); 77 Fed. Reg. 65,305, 65,306 (Oct. 26, 2012) (EPA "interpret[s] the [Act] to require an opportunity for judicial review of a decision to grant or deny a [Prevention of Significant Deterioration] permit, whether issued by EPA or by a State under a SIP-approved or delegated [] program" (citing 61 Fed. Reg. 1880, 1882–83 (Jan. 24, 1996)). A state permitting agency's decision to use the SILs recommended in the Guidance would likewise be reviewable by a state court.

III. THE GUIDANCE REASONABLY INTERPRETS 42 U.S.C. § 7475(a)(3).

The Act provides that a permit applicant must "demonstrate[] that emissions from construction or operation of the applicant's proposed facility will not cause, or contribute to" a violation of the NAAQS or an increment. 42 U.S.C. § 7475(a)(3). This Court has held that the term "contribute" is ambiguous, leaving EPA and permitting authorities discretion to determine what air quality impact "causes, or contributes." Petitioner's plain meaning argument is contrary to the statutory text and well established case law.

A. The Act Is Ambiguous Regarding The Degree of Air Quality Impact That "Causes, or Contributes to" a Violation and Leaves EPA and Permitting Authorities Discretion in Making That Judgment.

As discussed above, the Act states that the owner or operator of a proposed source must "demonstrate[] that emissions from construction or operation of such

facility will not cause, or contribute to, air pollution in excess of any" increment or NAAQS. 42 U.S.C. § 7475(a)(3)(A), (B). However, the Act does not specify how a permit applicant or permitting authority is to demonstrate or determine whether a proposed new or modified source will (or will not) cause or contribute to a violation of a NAAQS or applicable increment. *See Sierra Club*, 705 F.3d at 465. Further, the phrase "cause, or contribute," as used in section 7475, is ambiguous. It therefore leaves to a permitting authority's discretion the determination of what level of impact "causes, or contributes" to a violation. Petitioner's reading is contrary to the words of the statute and longstanding precedent and should be rejected.

To begin with, the phrase "cause, or contribute to," and the included terms "cause" and "contribute" are not defined in 42 U.S.C. §§ 7479 or 7602, or any other section of the Act. In the absence of a statutory definition, courts consider whether a disputed term has an ordinary meaning. *See Petit v. Dep't of Education*, 675 F.3d 769, 781 (D.C. Cir. 2012); *NRDC v. EPA*, 489 F.3d 1250, 1258 (D.C. Cir. 2007); Memorandum at 2 (JA0023). But the meaning of a statutory term also depends on the context in which it is used. *See, e.g., Bell Atlantic Tel. Co. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

The verb "cause," in the context of section 7475(a)(3), may be understood to refer to emissions from a proposed source that will "be responsible for, be the

reason for, or result in" a violation of a NAAQS or an increment. In other words, emissions from a proposed source that, when modeled, produce a violation that "would not be projected to occur 'but for' the increased emissions." Memorandum at 2-3 (JA0023-0024) (citing dictionary definitions of "cause" and 57A Am. Jur. 2d Negligence § 415). However, the inclusion of "or contribute to" in the phrase "cause, or contribute to" makes clear that Congress did not intend for section 7475(a)(3) to apply *only* when emissions from a proposed source are a "'but for' cause of a violation." Memorandum at 3 (JA0024). Instead, it should be read to also apply where a proposed source would "contribute" to a violation that might be modeled even without the impact of the proposed source. *Id*.

Petitioner acknowledges that the phrase "cause, or contribute to" expands the application of section 7475(a)(3) beyond the circumstance of "but for" causation, (*See* Pet. Br. at 33). For this reason, Petitioner's citation to *North Carolina v. EPA* is inapt. *See* Pet. Br. at 31, 33, *citing* 531 F.3d 896, 910 (D.C. Cir. 2008). As discussed further below, EPA's interpretation does not "reduce [the] coverage" of section 7475(a)(3) to something less than if it simply applied to air quality impacts that "cause" a violation. Pet. Br. at 33. Rather, EPA's interpretation *broadens* the section's application to include other "meaningful" (that is, more than "inconsequential" or "negligible") air quality impacts that may not, by themselves, "cause" a violation. *Infra* Argument III.B.

Moreover, Petitioner's suggestion that Congress' use of the terms "cause" and "contribute" together can be "unambiguously" understood as an intention to prohibit all "air quality impacts," no matter how "small" is wrong. *See* Pet. Br. at 34; *see also id*. at 31. This Court has held on multiple occasions that "contribute" does *not* have a consistent, ordinary meaning and, when used in other Clean Air Act provisions, is ambiguous with respect to the degree of air quality effect to which it applies. *See Catawba County*, 571 F.3d at 39; *EDF v. EPA*, 82 F.3d 451, 459, *as amended by* 92 F.3d 1209 (D.C. Cir. 1996); *see also* Memorandum at 3 (JA0024).

EDF involved 42 U.S.C. § 7506(c). This provides for conformity determinations to be made for transportation plans, programs and projects before EPA approves a plan revision. 82 F.3d at 458. Under this provision, such plans and programs may be found to conform if they, "with respect to ozone and carbon monoxide nonattainment areas, *contribute to annual emissions reductions consistent with*" specified Clean Air Act provisions. 42 U.S.C. § 7506(c)(3)(A)(iii), *quoted with emphasis in* 82 F.3d at 458. The petitioners' argument in *EDF* assumed that the plain meaning of section 7506(c) required each individual plan or program to "produce an absolute reduction in the given emissions." *Id*. at 459. By contrast, EPA found that the language was not that clear. *Id*. The Court reasoned that "'contribute to' in section [7506(c)] . . . is

ambiguous and 'leaves wide open the question of how large a reduction in emissions must be to constitute a contribution.'" Memorandum at 4 (JA0025) (quoting 82 F.3d at 459).

More recently, *Catawba County* presented challenges to EPA's interpretation of 42 U.S.C. § 7407(d). There, EPA must designate as "nonattainment" any area that does not meet a NAAQS or "that contributes to ambient air quality in a nearby area that does not meet" the NAAQS. *Id*. § 7407(d)(1)(A)(i). The petitioner asserted that "contribute[]" necessarily implies "a significant causal relationship" and requires quantification of a threshold amount of air pollution that "contributed" to the nearby area. 571 F.3d at 38-39. As in *EDF*, the Court disagreed. Contrasting dictionary definitions of "contribute" "suggest[ed] an ambiguity that fatally undermines petitioners' *Chevron* step one argument." *Id*. at 39. The Court thus held that "section [7407(d)] is ambiguous as to how the EPA should measure contribution and what degree of contribution is sufficient to deem an area nonattainment." *Id*. at 39; Memorandum at 4 (JA0025).

Petitioner cites a case in which the Court upheld EPA's interpretation of the phrase "cause, or contribute to" in a Clean Air Act provision governing nonroad vehicle emissions, where EPA stated that the provision "does not require a finding of 'significant contribution,' but merely 'contribution,' for individual categories of nonroad engines." *Bluewater Network v. EPA*, 370 F.3d 1, 13 (D.C. Cir. 2004);

Pet. Br. at 32-33. The Court began its inquiry by examining dictionary definitions of "contribute" and finding that "[s]tanding alone, the term contribute "has no inherent connotation as to the magnitude or importance of the relevant 'share' in the effect; certainly it does not incorporate any 'significance' requirement." *Id*.

EPA agrees. There is no plain, unambiguous, inherent magnitude associated with the term "contribute," part of the reason the term is ambiguous in the context of section 7475(a)(3). But the statutory provisions at issue in *Bluewater* contained *two* pertinent phrases: first, "significant contributor," and second, "cause, or contribute to" without the "significant" modifier. *See* 42 U.S.C. § 7547(a)(2), (3); *Bluewater*, 370 F.3d at 13. The Court reasoned, in part, that Congress' use of these two distinct formulations within section 7547(a) made it clear that Congress intended to require a "significance" threshold where that modifying term was included in the statutory paragraph, and not where it was absent. *Id*.

Here, in contrast, there is no other formulation or analogous clarifying text in section 7475(a). EPA does not read the term "contribute" as having an "inherent connotation" of "significance" in section 7545(a)(3). Rather, the term is ambiguous in this context.

Moreover, EPA does not read the term "significantly" into section 7475(a)(3). As EPA explained, the Guidance does not use the term "significant contribution." Memorandum at 9 n.6. (JA0030). Rather, it uses the term

"significant impact" to identify a degree of change in air quality that is distinguishable from the inherent variability in pollutant concentrations and can thus represent an impact that causes or contributes to a violation of air quality standards.

In short, Petitioner identifies no sound basis to depart from *Catawba County* and *EDF* and conclude that Congress has unambiguously commanded Petitioner's reading of "contribute." Accordingly, if the Court reaches the merits, it should find that the statutory text is ambiguous and subject to reasonable interpretation.

B. EPA's Non-binding Interpretation of Section 7475(a)(3) to Apply to Meaningful Impacts on Air Quality is Reasonable.

In the absence of specific language in section 7475(a)(3) regarding the degree of contribution that is required, EPA or another permitting authority has discretion to exercise its expertise. They can apply their judgment to determine the degree of impact that "contributes" to a violation of the NAAQS or increment based on the particular context in which that term is used. Memorandum at 4-5 (JA0025-0026). For purposes of the Guidance, EPA determined that the $PM_{2.5}$ and ozone SILs may be used as acceptable quantitative criteria to identify the degree of impact on air quality that is a "significant" or "meaningful" "impact"—i.e., "more than 'inconsequential' or 'negligible'—and thus amounts to a "contribution" for

purposes of section 7475(a)(3). Memorandum at 9 n.6 (JA30). This approach is reasonable.

1. EPA's legal interpretation is consistent with the purposes and structure of the Act's Prevention of Significant Deterioration provisions.

Contrary to Petitioner's arguments, EPA explained how its interpretation of "cause, or contribute to" fits the context in which the language is used and "the overall statutory scheme." *See* Pet. Br. at 35. To begin with, EPA's interpretation is consistent with the purposes of the Act's Prevention of Significant Deterioration provisions. Two purposes of that program are: (1) to "insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources" and (2) to "assure that any decision to permit increased air pollution . . . is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation." Memorandum at 5 (JA0026), *quoting* "Congressional declaration of purpose," 42 U.S.C. § 7470(3), (5). This Court has held that these statements of purpose express Congress' desire to "balance the values of clean air, on the one hand, and economic development and productivity, on the other." *NRDC v. EPA*, 937 F.2d 641, 645-46 (D.C. Cir. 1991); Memorandum at 5 (JA0026). The statutory text together with Congress' declaration of purpose is another indication that permitting authorities may exercise some judgment in the course of reviewing a permit

application and militates against a view that any degree of impact must be considered to "cause, or contribute to" a violation, without any consideration of whether that degree of impact is meaningful. Memorandum at 5-6 (JA0026-0027).

Petitioner acknowledges that there is an inherent tension between these goals that must be balanced. Yet it argues that certain statutory exceptions already provide sufficient "flexibility," making SILs unnecessary. Pet. Br. at 41-42; *see also* Pet. Br. at 37-39. This argument misses the mark. The Guidance does not assert that the use of SILs is justified because they provide flexibility. Rather, the SILs provide permitting authorities one tool for identifying the *degree* of air quality impact that "causes, or contributes to" NAAQS or increment violations, consistent with Congress' directive that EPA specify models and the conditions under they should be used for purpose of making the required demonstration. *See* 42 U.S.C. § 7475(e)(3)(D).

To confirm the reasonableness of its interpretation, EPA also compared the Act's Prevention of Significant Deterioration provisions with its preconstruction permitting program for nonattainment areas. This is known as "Nonattainment New Source Review." Memorandum at 6-7 (JA0027-0028). The nonattainment area provisions require that a proposed major source or major modification in a nonattainment area offset projected emissions increases by an equal or greater reduction in actual emissions from other sources. 42 U.S.C. § 7503(a)(1)(A), (c).

This requirement is mandatory in the Nonattainment New Source Review context. It allows no discretion to the permitting authority. Because the Act requires the source to offset its emissions increase, the Act in effect conclusively presumes that emissions from the source "cause" or "contribute to" the nonattainment condition. Memorandum at 6 (JA0027).

By contrast, the Act provides discretion to Prevention of Significant Deterioration permitting authorities. They may determine, through the use of modeling and other statistical tools as identified by EPA, whether the emission increase from a proposed source will "cause, or contribute to" a violation, before the source would find it necessary to mitigate its ambient impact. *See* 42 U.S.C. § 7475(a)(3), (e); Memorandum at 7 (JA0028). This makes sense. Had Congress meant to prevent Prevention of Significant Deterioration permitting authorities from exercising discretion where there is any modeled violation, including any preexisting violation, regardless of whether the proposed source has been determined to contribute to such violation, it presumably would have included a mandatory offset requirement for such circumstances in section 7475 similar to that in section 7503. *See* Pet. Br. at 35 ("When 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely [.]'"), *quoting Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452-53 (2002).

EPA's reading of "contribute" is further supported by Congress' explicit recognition in the statutory text that air quality models would be needed to make the showing required under section 7475(a)(3). Congress did not specify particular models or how EPA must apply them. It conferred on EPA discretion to specify models through regulation and to place conditions on the models' use. 42 U.S.C. § 7475(e)(3); *see also id*. § 7620(a); Memorandum at 7 (JA0028).

That section 7475(e)(3) gives EPA responsibility to determine the methods to be used by permit applicants to make the required demonstration is further evidence of legislative intent that EPA "exercise its judgment to determine the degree of impact that 'contributes to' a violation of the NAAQS and thereby fill a gap in the statutory scheme." Memorandum at 7 (JA0028). Although section 7545(a)(3) does not expressly refer to the exercise of "judgment" or agency "discretion" (Pet. Br. at 37), this power can reasonably be inferred from, among other things, section 7475(e)(3)'s direction to promulgate regulations regarding "the analysis required under this subsection" and to specify air quality models to be used under specified sets of conditions. *See EDF*, 82 F.3d at 459-60 (deferring to EPA's reasonable interpretation "given the statute's express directive to the Agency to 'promulgate criteria and procedures for demonstrating and assuring conformity'"), *quoting* 42 U.S.C. § 7506(c)(4)(A). Further, EPA reasonably understands that Congress, having directed EPA to develop air quality models,

anticipated that those models would be capable of predicting relatively small increases in air pollutant concentrations and that "there would be a point at which a small projected air quality impact . . . becomes so inconsequential that [] permitting authorities may reasonably conclude that such an impact does not cause, or contribute . . . ." Memorandum at 8 (JA0029).

Finally, by demonstrating that increased emissions from a proposed source will be controlled to the point that these emissions will not have a meaningful impact on air quality in the affected area, EPA's interpretation is appropriately mindful of the Prevention of Significant Deterioration program's focus on controlling increased emissions from the construction and modification of large stationary sources, as opposed to other provisions of the Act. Those provisions require states to target emissions from existing stationary sources through the state implementation planning process.

The EPA's recommended application of SILs does not remove or amend the requirement to make the air quality demonstration. EPA's technical analysis, if adopted by a permitting authority, would support a conclusion that air quality impacts from the proposed source below the level of the SIL will not be discernable from changes (or lack of changes) to the design value due to the inherent variability that would otherwise occur—e.g., those induced by weather, existing sources, and upwind contributions—so that any such level of predicted

impact from the proposed source may be considered not meaningful. Therefore, the approach EPA describes in its Guidance is consistent with this Court's observation in *Sierra Club*, 705 F.3d at 465, that it would be unlawful to "rely[] on permitting authorities to address violations [by revising their plans], rather than to prevent violations by requiring demonstration that a proposed source or modification will not cause a violation."

2. The Guidance does not "exempt" sources or "authorize violations."

Petitioners' remaining criticisms of EPA's legal interpretation are also misplaced. Nowhere does the Guidance purport to "authorize 'permitting authorities to automatically exempt sources with projected impacts below the SILs" from the demonstration requirement. Pet. Br. at 29, *quoting Sierra Club*, 705 F.3d at 465. On the contrary, EPA said directly that "SILs do not function to exempt a source from making the demonstration required by section 165(a)(3)" but rather "provide a streamlined means of making the air quality impact demonstration" required by this provision. Memorandum at 13 (JA0034); see also Guidance at 5 (JA0006). EPA also made clear that the Guidance, unlike the 2010 rule, does not rely on any theory of inherent agency authority to exempt *de minimis* circumstances from regulation. *See* Memorandum at 12-14 (JA0033-0035). Rather, as shown above, the Guidance expresses the interpretive view that "the

phrase 'cause, or contribute to' in section [7475(a)(3)] . . . is reasonably read in context to not apply to impacts on air quality that are not meaningful or significant." *Id*. at 13 (JA0034); *accord NRDC v. EPA*, 571 F.3d 1245, 1260 (D.C. Cir. 2009) (finding reasonable EPA's interpretation that planning requirements for the ozone NAAQS did not apply to areas in certain circumstances, and rejecting the notion that this reading improperly "waive[d]" the requirements).[15]

Further, the Guidance provides a technical basis to help permitting authorities make the judgment that a source's impacts are not meaningful enough that they would "cause, or contribute to" a violation. *See infra* Argument III.C. Moreover, EPA emphasized that even where a proposed source's projected air quality impacts are below the relevant SIL, permitting authorities "have the discretion to require further information or a cumulative impact analysis." Memorandum at 13 (JA0034); *accord* Guidance at 19-20 (JA0020-0021).

Nor does the Guidance purport to nullify the preconstruction monitoring requirements in 42 U.S.C. § 7475(e)(2). Pet. Br. at 39-40. Petitioner claims that "for sources complying with a SIL, permitting authorities may ignore the results of

[15] Likewise, the Guidance does not add to the Act's express exceptions from the demonstration requirement, for it does not suggest SILs are justified as an "exception" to the requirement, but rather as a partial means of demonstrating that a proposed source will not have an impact that "causes, or contributes to" a violation. *See* Pet. Br. at 37-39.

this monitoring and analysis entirely, draining meaning from these requirements." *Id*. at 40. But section 7475(e)(2) only governs what preconstruction monitoring data collection should be performed, and when the analysis of such data should be made publicly available. It does not dictate how that data is to be used to inform the permitting authority's decision under section 7475(a)(3). *Id*. § 7475(e)(2).

Finally, the Guidance and Memorandum explicitly provide that each decision of a permitting authority on a permit application must be supported by the administrative record and legal justification provided for that specific permitting decision. This includes any decision to use a SIL as part of an air quality demonstration. *See* Guidance at 3, 19-20 (JA0004, JA0020-0021); Memorandum at 14 (JA0035). The Guidance does not purport, simply by virtue of its issuance and application, to "authorize" *any* decision.

C. The SILs Are Based on a Conservative and Sound Statistical Methodology That EPA Thoroughly Explained.

Petitioner generally does not challenge EPA's statistical methodology in support of the Guidance. Indeed, it concedes that EPA's approach "provides a measure of [the] magnitude" of a proposed source's emissions impact. Yet Petitioner claims that it is arbitrary because it does not measure "whether the impact exists or will cause or contribute to a violation." Pet. Br. at 44-45. This argument fundamentally overlooks that violations of the NAAQS and increments

are measured by looking at the relevant design value. This generally is based on an average of pollutant concentrations over a defined period. If the air quality impact of a proposed new source is much less than the inherent variability of the atmosphere, such that the level of impact is indiscernible from the inherent variability —which will generally be the case when the source's projected impacts are lower than the SIL—then such information, in light of the EPA's technical analysis, rationally supports a conclusion that the source will not "cause, or contribute to" a violation. EPA explained this point in the Guidance: "for purposes of the [Prevention of Significant Deterioration] program, we are seeking to identify a concentration value that constitutes an insignificant impact, meaning a change in the design value that does not reflect a meaningful difference in air quality based on the introduction of a new source." Guidance at 13 (JA0014). In other words, it is not just that proposed source impacts below the level of the SILs are "small," but that they do not meaningfully change an area's air quality as measured by design value.

Petitioner's analogies to a football placed one inch from the end zone, or pouring water into a bucket, do not fit. They fail to capture, among other things, the inherent variability that causes air quality to fluctuate over time, the temporal aspect of design value measurement, and the predictive aspect of Prevention of Significant Deterioration air quality analysis. Pet. Br. at 45, 48. For example,

EPA's Guidance recognizes the reality in such permitting that Petitioner's football (air quality) is not standing still but vibrating back and forth before the snap (when the proposed source begins to operate and the atmosphere sees increased emissions). Likewise, the level of water in a bucket (or perhaps more aptly a swimming pool) is neither unchanging nor flat, e.g., due to wind, weather, and other factors. It is thus reasonable to conclude that a modeled degree of change that is within the range of the inherent variability in the baseline conditions is not meaningful and may reasonably be considered not to "cause, or contribute to" a subsequent touchdown or an overflowing bucket. EPA also reasonably looked at air quality variability in locations across the country and had reason to conclude that this variability was relatively consistent notwithstanding differences in the level of background air quality or location. *Supra* at 17-18.

Furthermore, while the Guidance thus uses SILs to identify degrees of air quality impact from a proposed source that may be considered insignificant and not meaningful at any location independent of background levels and impacts from other sources, the Guidance itself does not *determine* that a proposed source's impact is "insignificant" in the context of any particular permitting application. As EPA explained, "permitting authorities *may generally* conclude there is no need to conduct a cumulative impact analysis" when single-source analysis shows that a proposed source will not have a significant impact on air quality. Guidance at 17-

18 (JA0018-0019) (emphasis added). "However, upon considering the permit record in an individual case, if a permitting authority has a basis for concern" that this demonstration is not sufficient, "then the permitting authority should require additional information from the permit applicant to make the required air quality impact demonstration." *Id*. at 18 (JA0019). This means that permitting authorities retain the discretion to require more information from a proposed source notwithstanding that its modeled impact is within the Guidance's recommended SILs, if (as Petitioner posits may occur) information suggests that the air quality impacts identified in the Guidance are "not . . . small . . . in the context of [that] particular air quality region." Pet. Br. at 47. This may (in the case-by-case judgment of a permitting authority) include situations where "the increment or NAAQS is already mostly consumed or where many sources are being built." *Id*. at 47-48. To use Petitioner's football analogy, even if the ball is initially spotted short of the goal line based on EPA's guidance, for a close call, the referees still need to look at videotape (other information in the permitting record) and retain the discretion to conclude that the ball did cross the plane of the goal line based on the video evidence.

Thus, the Guidance recommends that the SILs EPA derived are suitable for use "*on a case-by-case basis* at the same points in the [] air quality analysis as SIL values historically have been used in the [Prevention of Significant Deterioration]

program [with one exception not relevant here]." Guidance at 17 (JA0018) (emphasis added). The Guidance does *not*, however, restrict permitting authorities' ability to seek additional data and analysis, and makes clear that the record and stated rationale in each individual case must support that particular permitting decision. *See* Guidance at 17-20 (JA0018-0021); *supra* at Argument I.A. It is inaccurate, therefore, to say EPA "fail[ed] to consider [this] aspect of the problem." Pet. Br. at 47 (internal quotation omitted). Rather, EPA appropriately left such issues for case-by-case consideration in the review of each permitting application, as the Guidance is not intended to "determine" whether sources cause, or contribute to violations. Likewise, the Guidance does not represent a "depart[ure]" from past EPA statements recognizing that there may be individual cases in which the use of a SIL is not appropriate. *See* Pet. Br at 48-49.

Finally, EPA took a reasonable approach in selecting SIL values for Class I, II, and III areas. *See* Pet. Br. at 49-50. For the $PM_{2.5}$ increments, which are smaller for Class I than for Classes II and III, the recommended SIL values also are smaller for Class I areas than for other areas. Guidance at 17 (JA0018).[16] For the ozone and $PM_{2.5}$ NAAQS, which, in contrast, are "uniform throughout the class areas," EPA concluded that "no class-specific protection via SILs is necessary

[16] As previously noted, there currently are no areas designated Class III. *Id*.

when assessing whether a source causes or contributes to a violation of the NAAQS," and recommended that the same SILs values apply to all areas. *Id*. at 16 (JA0017). Petitioner claims that this is arbitrary. EPA recognized that "historically, Congress has provided special protections to Class I areas." *Id*. But the "special protections" to which EPA referred include the notably lower Class I increments, as well as the provisions for Federal land managers to identify and protect "air quality related values" in the different class I areas, none of which are affected by the Guidance. *Id*. at 16 n.43 (JA0017).

CONCLUSION

For the reasons stated in Arguments I and II, the Court should dismiss the petition for lack of subject matter jurisdiction. If the Court reaches the merits, it should deny the petition for the reasons stated in Argument III.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Assistant Attorney General

JOHNATHAN D. BRIGHTBILL
Deputy Assistant Attorney General

Dated: June 11, 2019

/s/ *Brian H. Lynk*
BRIAN H. LYNK
United States Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
P.O. Box 7611

Washington, D.C. 20024
Tel: 202-514-6187
brian.lynk@usdoj.gov

Of Counsel:
BRIAN DOSTER
MARK KATAOKA
United States Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Proof Brief of Respondents was served, this 11th day of June, 2019, on all registered counsel, through the Court's CM/ECF system.

/s/ *Brian H. Lynk*
Brian H. Lynk
United States Department of Justice
Environment & Natural Resources Div.
Attorney for Respondents

CERTIFICATE OF COMPLIANCE WITH WORD LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing proof Brief of Respondent EPA contains 12,950 words as counted by the Microsoft Office Word 2007 word processing system, and thus complies with the applicable word limitation.

/s/ *Brian H. Lynk*
Brian H. Lynk
United States Department of Justice
Environment & Natural Resources Div.
Attorney for Respondents

ATTACHMENT A

U.S. Environmental Protection Agency
Pacific Southwest - Region 9
Clean Air Act Permit

Fact Sheet

Palmdale Energy Project
PSD Permit: SE 17-01

August 2017

Fact Sheet

Proposed Prevention of Significant Deterioration Permit

Palmdale Energy Project
Palmdale, California

PSD Permit No. SE 17-01

Contents

Table 24 Summary of Maximum Project Impacts, SILs, Background Concentrations, NAAQS, and PSD Class II Increments

NAAQS pollutant & averaging time	Maximum Project-Only Modeled Impact, µg/m³	SIL, µg/m³	Background Concentration, µg/m³	NAAQS µg/m³	PSD Class II Increment, µg/m³	Project Impact at or above SIL?
CO, 1-hr	124	2000	2,176	Primary: 40,000 (35 ppm)	N/A	No
CO, 1-hr (Startup/shutdown)	575	2000	2, 176	Primary: 40,000 (35 ppm)	N/A	No
CO, 8-hr	29	500	1,603	Primary: 10,000 (9 ppm)	N/A	No
CO, 8-hr (Startup)	89	500	1,603	Primary: 10,000 (9 ppm)	N/A	No
NO_2, 1-hr	14	7.5 (4 ppb)	81	Primary: 188 (100 ppb)	N/A	**Yes**
NO_2, 1-hr (Startup)	57	7.5 (4 ppb)	81	Primary: 188 (100 ppb)	N/A	**Yes**
NO_2, annual	0.98	1.0	15.1	Primary and Secondary: 100 (53 ppb)	25 (13 ppb)	No
PM_{10}, 24-hr	7	5	80	Primary and Secondary: 150	30	**Yes**
$PM_{2.5}$, 24-hr	7	1.2	18	Primary and Secondary: 35	9	**Yes**
$PM_{2.5}$, annual	0.7	0.2	6.1	Primary: 12 Secondary:15	4	**Yes**

Source: See Section 7.3 and Tables 7-2 and 7-4 of the October 2015 Application

SIL Values: The 1-hr NO_2 SIL is provided in the EPA's June 28, 2010 and March 1, 2011 memos entitled "Applicability of Appendix W Modeling Guidance for the 1-hour NO_2 National Ambient Air Quality Standard" and "Additional Clarification Regarding Application of Appendix W Modeling Guidance for the 1-hour NO2 National Ambient Air Quality Standard," respectively.[83] The 24-hr and annual $PM_{2.5}$ SIL values are provided in the EPA's August 18, 2016 draft $PM_{2.5}$ guidance entitled "Guidance on Significant Impact Levels for Ozone and Fine Particles in the Prevention of Significant Deterioration Permitting Program" as well as the supporting "Technical Basis for the EPA's Development of Significant Impact Thresholds for PM2.5 and Ozone" and the supporting "Legal Support Memorandum: Application of Significant Impact Levels in the Air Quality Demonstration for Prevention of Significant Deterioration Permitting under the Clean Air Act," both dated August 1, 2016. [84] For the 1-hr and 8-hr CO, annual NO_2, and 24-hr PM_{10} SILs, see 40 CFR 51.165(b)(2).

[83] https://www3.epa.gov/scram001/guidance/clarification/ClarificationMemo_AppendixW_Hourly-NO2-NAAQS_FINAL_06-28-2010.pdf and https://www.epa.gov/sites/production/files/2015-07/documents/appwno2_2.pdf

[84] https://www.epa.gov/nsr/draft-guidance-comment-significant-impact-levels-ozone-and-fine-particle-prevention-significant

7.3.4: Results of the Cumulative Impacts Analysis

The results of the PSD cumulative impacts modeling analysis for PEP's normal operations and startup and shutdown periods are shown in Table 25. The analysis demonstrates that emissions from PEP during normal operations and startup and shutdown will not cause or contribute to a violation of the NAAQS for 1-hour NO_2, 24-hour PM_{10}, 24-hour $PM_{2.5}$, or annual $PM_{2.5}$ or the applicable PSD increments for these pollutants and averaging periods. For cumulative impacts, as compared to the NAAQS, the modeled impacts of the Project and appropriate nearby sources were added to the background concentration. The modeled impacts of the Project and appropriate nearby sources may vary from the Project-only impacts provided above in Table 24 because the cumulative analysis considers the form of the NAAQS, and the Project-only analysis considered a more conservative worst-case impact. As described further in Section 7.4.2.2, for Class II PSD increments, the modeled impacts of the Project and appropriate nearby sources may be compared to the applicable increment.

Table 25 Summary of Project and Nearby Sources Impacts, PSD Class II Increments, Background Concentrations, Cumulative Impacts with Background, and NAAQS

NAAQS pollutant & averaging time	Project and Nearby Sources Modeled Impact (µg/m³)	PSD Increment, Class II (µg/m³)	Background Concentration (µg/m³)	Cumulative Impact (µg/m³)	NAAQS (µg/m³)
NO_2, 1-hr	See note	N/A	See note	111	Primary: 188 (100 ppb)
NO_2, 1-hr (startup/shut down)	See note	N/A	See note	126	Primary: 188 (100 ppb)
PM_{10}, 24-hr	7	30	80	87	Primary & Secondary: 150
$PM_{2.5}$, 24-hr	5	9	18	23	Primary & Secondary: 35
$PM_{2.5}$, annual	0.77	4	6.1	6.9	Primary: 12 Secondary: 15

Sources: October 2015 PSD Application Table 7-8 and 7-9, p.7.4-7 and 7.4-8.
Note: NO_2 impacts were evaluated using the Tier 3 Ozone Limiting Method (OLM), with hourly seasonal background values added consistent with EPA modeling guidelines, and as a result, separate modeled and background values not available. There are no PSD increments for 1-hour NO_2. See Section 7.4.6.